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In the Supreme Court of the United States.

October Term, 1919

No. 315

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Appeal from the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE WESTERN UNION TELEGRAPH COMPANY.

RUSH TAGGART,
Attorney for the
Western Union Telegraph Company.

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In the Supreme Court of the United States.

OCTOBER TERM 1918.
No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Western Union Telegraph Company, Appellant.

This appeal brings into this Court for review a decree of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the United States District Court for the Southern District of New York in an action wherein The Baltimore and Ohio Railroad Company was complainant, and The Western Union Telegraph Company, defendant.

The Baltimore & Ohio Railroad Company is a corporation of the State of Maryland. The Western Union Telegraph Company is a corporation of the State of New York, and the suit in addition to one being wholly between citizens of different

States, involves a construction of the Interstate Commerce Act of February 4, 1887, and some of the amendments thereof.

Under date of the 15th day of October, 1887, the telegraph company and the railroad company entered into an agreement relating to construction, maintenance and operation of telegraph lines along the system of railroads owned by the railroad company, for the period of fifty years from the date of the contract, with privileges of renewal for further terms in successive periods of fifty years each.

It may be proper to say by way of introduction, and as statement of the importance of the question involved in this case, that similar questions affect the working of the telegraph lines of the telegraph company, and the operation of the railways of practically 95 per cent. of the railroad mileage of the United States. Shortly after the introduction of the telegraph and the use of it as an efficient instrumentality of quick transmission of intelligence, the advantages of it in the operation of railways became apparent, and the development and construction of its lines were largely along the lines of railways, and under contracts by which the same system of wires was made available for commercial purposes for the public and the Government and for the railroad company in the transmission of intelligence relating to its railroad and for the expediting of traffic, both passenger and freight.

Such contracts had become practically universal long before Congress began to legislate respecting the regulation of railways in the Interstate Commerce Act of February 4, 1887. By means of such contracts The Western Union Telegraph Company had been enabled to establish practically a universal system of telegraphy reaching all parts of the country, and it is significant that of the 15,000 or more offices maintained by that company where

commercial messages could be sent at the time of the passage of the Interstate Commerce Act, over 12,000 of them were offices which could not have been thus maintained except by the instrumentality of its contracts with the railroad companies. These contracts fundamentally provide for contributions by each of the parties to the construction, maintenance and operation of the lines of telegraph, the most common being contribution by the telegraph company of the material, and a certain part of the labor known as the skilled labor, and by the railroad company of the unskillled labor, right of way, transportation of men and material. The portions in which these respective contributions were made vary in different contracts. The contracts provide for a division of the uses of the lines constructed, these varying in view of the changed conditions that obtain on different railways. Such contracts also provide that at stations where the railway company maintains a telegraph operator and office in connection with the movement of trains, that such operator shall receive and transmit for the telegraph company commercial messages, and thereby at a large number of stations which otherwise would be unable to obtain commercial service the public have obtained commercial service. Such contracts also provide as contributions on the part of the railroad company for transportation of employees of the telegraph company and also transportation of material, such material consisting of two classes; material used for repair and reconstruction of lines upon the lines of the railway company to which the contract applies, and a second class of material passing over those lines of railway to be used on other portions of the telegraph company's system in the United States. Such contracts usually provide that the railway messages between points on the line of railway

shall be transmitted over certain wires set apart for the use of the railway company by railway operators, but they also provide that messages relating to the railway company's business from points off the line of the railway to other points off the line of the railway will be transmitted by the telegraph company in amounts to be determined by calculating the messages at commercial rates, up to an amount named in the contract, and with provision that excess over such amounts shall be paid for at half such commercial rates.

When the Interstate Commerce Act was originally passed it was made applicable to railway companies alone, and such contracts were not considered as in any way inhibited, modified or qualified by any provision of the Act. Later, when what is known as the Hepburn Amendment was adopted in 1906 amending Section 6 of the Act and requiring railway companies to file tariffs, and prohibiting the transportation in any manner of any commodity except in accordance with tariffs on file, and prohibiting compensation for such transportation being received otherwise than in money, the question arose respecting the applicability of such Amendment to provisions of the telegraph contracts, and particularly with respect to transportation of material by the railway company for the construction, maintenance and reconstruction of the telegraph lines. Accordingly in December, 1906, The Western Union Telegraph Company and the Postal Telegraph Company each filed a petition to the Interstate Commerce Commission asking for an interpretative ruling respecting their rights under these contracts in view of the Amendment to Section 6 of the Act. After a full hearing, the Commission in December, 1906, made its ruling which is reported in 12th Interstate Commerce

Reports, page 10, in which a sharp line of demarcation was drawn between the transportation of telegraph company's material to be used upon the line of the railway transporting, and the telegraph company's material to be used off the line of the railway company transporting thereby creating a differentiation between so-called "on line" material and "off line" material.

As to the first, the ruling of the Interstate Commerce Commission was that this was not transportation such as the railway company would conduct for an ordinary shipper, but was a means whereby the railway company secured a facility for its own service and was therefore differentiated from an ordinary shipment, but that "off line" transportation of telegraph company's material did not differ from ordinary shipments, and therefore the telegraph company was under obligation to comply with the provisions of Section 6 to the Act, and that the railway company could not receive such shipment otherwise than upon payment of money at the regular tariff rates.

Following this ruling which was made a conference ruling, and promulgated as such, the telegraph company and the railway companies for the most part covered the situation by supplemental contracts by means of which there was practically a compliance with the ruling.

In June, 1910, there was a general amendment of the Act, and among other changes the telegraph, telephone and cable companies were brought within the provisions of certain sections of the Act and in the first section after such companies were subjected to the provisions of the Act with respect to its requirements as to reasonableness of the charges for service, it was:

"*Provided* that messages by telegraph, telephone or cable, subject to the provisions of this Act, may

be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages; *and provided further,* that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

With reference to the interchange of passes there was a provision also inserted in the first section of the Act that the general prohibition respecting free passes and free transportation should be qualified as follows:

"*And provided further,* that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act."

The provisions of Section 6 of the Act hereinbefore referred to were not made applicable to telegraph, telephone and cable companies. Following the amendment, questions arose very shortly respecting how far, if at all, the limitations which the Interstate Commerce Commission in its ruling of December, 1906, applied to the transportation of employees of the telegraph company by the railway company, and also with respect to the transportation of materials either "on line" or "off line." Some of these questions are presented in an appendix of this brief, which shows correspondence with the Commission relating to various contracts, and the questions submitted to the Commission which finally resulted on the 15th

of July, 1914, in a conference ruling agreed upon by the Commission reading as follows:

"Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services, 'a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad, or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

This ruling raised further questions respecting the matter which finally resulted in a request of the Commission to the telegraph company and representatives of some of the railway companies affected, to file memoranda and briefs, and in a further conference ruling of March 28, 1916, upon which no order was issued by the Interstate Commerce Commission; but this ruling of March 28, 1916, was in

the same terms as that of July, 1914, and the substance appears in the list of conference rulings of the Commission No. 219. This ruling it will be seen unsettled practically all the railway and telegraph contracts in the country by prohibiting the railway company from transporting any "off line" material except under the provisions of Section 6 of the Interstate Commerce Act, and at full local rates. The ruling also left the question uncertain as to how far, if at all, the telegraph company could carry out the provisions of a contract with respect to the transmission of messages upon its lines for the Railroad Company except at its full and regular commercial rates.

Prior to the amendment of June 28, 1910, and following the decision of the Interstate Commerce Commission of December, 1906, the Baltimore & Ohio Railroad Company had refused to carry out the provisions of the contract as to "off line" material, and the Telegraph company had brought its action in the United States Circuit Court for the District of Maryland to enforce that provision of the contract. The case had been argued and submitted, and was under consideration by the Court when the amendment of June, 1910, was adopted by Congress, providing, among other matters, "that nothing in this Act shall be construed to prevent telegraph, telephone and cable companies from entering into contracts with common carriers for the exchange of services." It was the view of both parties to the suit that this removed all disabilities with respect to the transportation of material, and thereupon the suit was dismissed without prejudice and both parties entered into the performance of the contract, and continued until the ruling of the Commission after the full hearing on the 28th of March, 1918, which, as we have seen, disabled the railway company from performing that

part of its contract obligations, and if the Interstate Commerce Commission's construction of the Act is the correct one, likewise disabled the telegraph company from performing a certain portion of the contract relating to the transmission of messages. Thereupon, following such ruling the telegraph company declined to carry out this provision of the contract and subject itself to the possible penalties involved in case the Interstate Commerce Commission's ruling was the correct one. Thereupon the railway company filed its bill setting forth the foregoing state of facts, and the position in which it found itself in respect to the contract, affirming that the Interstate Commerce Commission had misinterpreted in its ruling of March 28, 1916, the scope, force and effect of the provision in the Interstate Commerce Act, and that the railway company and the telegraph company were not prohibited from carrying out these provisions of the contract affected by the ruling by reason thereof, and thereupon asking the Court to construe the Act, and define the rights of the parties under the contract, and to adjudge and decree that the Western Union should be perpetually enjoined from violating the provisions of the contract in respect to its obligation to transmit the messages of the railway company as provided in the contract.

The case came on for hearing in the District Court, and in view of the ruling which had been made the Counsel of the Interstate Commerce Commission was invited to participate, and the Court ordered that he be heard, and that the telegraph company should appeal if so requested by the Interstate Commerce Commission in order that a final determination might be had of the highest tribunal respecting the question which was thus presented for determination. The District Court found in

favor of the construction of the Act contended for by the railway company, and which had also been contended for by the telegraph company, as will appear from the appendix and the correspondence therein contained with the Interstate Commerce Commission respecting this question. The telegraph company thereupon in accordance with the understanding arrived at in the District Court, appealed to the Circuit Court of Appeals for the Second Circuit, and upon that appeal the Court of Appeals affirmed the ruling of the District Judge. Thereupon the telegraph company brought the case into this Court.

Assignment of Errors.

"I. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York, on the 28th day of February, 1917, wherein that Honorable Court found that the contract, dated October 15, 1887, between complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint as Exhibit "A," is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant-appellant herein in respect of such contract or agreement or in asserted compliance with such ruling.

"II. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant specifically perform said contract of October 16, 1887, between complainant-appellee and defendant-appellant.

"III. The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15, 1887, between complainant-appellee and defendant-appellant.

"IV. The Court erred in affirming the decree of the United States District Court for the Southern District of New York, made on the 28th day of February, 1917, wherein that Honorable Court found that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service" "as used in Section 1 of the Act to Regulate Commerce, as amended June 18, 1910 (U. S. Comp. Stat., Sec. 8563, sub. div. 3), authorizes the making of contracts or the continued performance of the contract heretofore made, between the complainant-appellee Railroad Company and the defendant-appellant Telegraph Company, dated October 15, 1884, by the terms of which said companies agree to exchange services upon bases other than the basis of the lawful rates of said Railroad Company, as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said Telegraph Company regularly charged other customers for similar services.

"V. The Court erred in making and entering a decree affirming the decree of the court below.

"VI. The Court erred in not reversing the decree of the court below.

"Wherefore the appellant prays that said decree

may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified."

Argument.

In connection with the foregoing statement, it is proper that the Telegraph Company should advise the Court that all times, both prior to and subsequent to the enactment of the Amendment of June 18, 1910, bringing telegraph companies subject to the control of the Interstate Commerce Commission, it has contended that all its contracts, both as respects "on line" transportation and "off line" transportation were valid, and that the railway companies should be required to carry them out according to their terms. That as respects this feature of the contracts in view of the peculiar relations created by such contracts between the Telegraph Company and the Railway Companies, the relation which Section 6 of the Interstate Commerce Act sought to regulate was not the relation which existed between these companies; that is, that the Telegraph Company was not with respect to such transportation a shipper as described in the sixth section of the Interstate Commerce Act. Inasmuch, however, as the Conference Ruling of the Commission of July, 1914, and repeated on March 28, 1916, had been promulgated by the Commission, and the consequence of refusing to follow such ruling might result in prosecutions for violation of the Interstate Commerce Act, very many of the railway companies refused to carry out their contracts, it became a serious question as how to secure a construction of the Interstate Commerce Act, which would review the action of the Commission and would be accepted by the railway companies. This action was therefore insti-

tuted for that purpose, and as appears from the record, the Interstate Commerce Commission was given full opportunity upon the trial of the action before Judge Mayer to appear and be heard, and Judge Mayer, in his discretion, accompanied the privilege to the Attorney of the Interstate Commerce Commission to thus appear with the condition in his favor that in case a decision was adverse to the view expressed by the Interstate Commerce Commission, that the defendant in the action should by proper proceedings bring the proceedings to a higher court in order that final determination might be made that would be considered binding and conclusive upon all parties. The Telegraph Company is therefore here formally assigning error in the decree, but desires that the Court should understand that it believes, as it has constantly insisted, that the decree below was right, but has brought the matter into this Court, in pursuance of its understanding with the District Court, in order that the Interstate Commerce Commission may have an opportunity to be heard through its counsel in support of its ruling.

While the reasons of the Railway Company in support of its view will be presented in its brief the Telegraph Company also begs to submit the following considerations which seem to it conclusive against the ruling of the Commission:

(a) The language used in the proviso "that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services" requires more than the Interstate Commerce Commission's ruling will permit to make it effective. It provides first for "contracts" implying that the parties may fix terms for such contracts. Under the Commission's ruling only one condition could be exacted by either party of

the other; that is payment of money at regular rates, while the Act authorizes *"contracts for exchange of services."* Exchange means "barter"; that is, the fixing of values and terms by each party equally with the term "contract." Both terms imply the fixing of terms dependent upon the special situation of the particular parties contracting or exchanging. It is the "exchange of services" without limitation, except such services as each party may in the particular situation be able to render to the other that is authorized. Such "exchange" implies valuation by each of the services to be furnished rendered to or by the other.

(b) The Commission's ruling and construction of the Act limiting the Railway Company's right to render services to the Telegraph Company to a measurement in money of transportation and the Telegraph Company's right to a like measurement in money of services rendered to the Railway Company, renders meaningless the proviso because without such a proviso such right would equally appertain to the parties.

(c) Both "on line" and "off line" transportation are each equally services required by the Telegraph Company in the maintenance of its lines of communication for the public, and the attempted distinction between the two is not justified by anything that appears in the Act. With respect to each the Telegraph Company stood in identically the same relation to the Railroad Company, and with respect to each the Railway Company was intended by Congress to be empowered to do something for the Telegraph Company separate and distinct from that which it could do for an ordinary shipper under Section 6 of the Act.

(d) Under the broad power to contract for exchange of services which existed prior to this Congressional legislation, and which we claim was fully

recognized by the proviso in the first section of the Act, the parties did enter into contracts which covered a great variety of services, and were not limited to transportation on the one side, and transmission of intelligence on the other. These elements, selected by the Commission in its ruling, were only one on each side, out of many which each party rendered in the way of services to the other, and the Interstate Commerce Commission was wholly unjustified in separating these two elements from all other elements in the contract, and treating them as intended by the parties to be each the equivalent of the other without respect to all the other features of the contract.

(e) The fact that the Railway Company owned a property covering a limited territory, and along which was situated a small part of the Telegraph Company's lines of communications, did not justify the conclusion that an entirely different rule was to be applied with respect to transportation of material that would be needed by the Telegraph Company upon the wire lines upon that railway, as differentiated from material required by the Telegraph Company on lines off the line of that railroad. The Telegraph Company equally required both classes of material, and Congress gave the parties full right to contract alike for the service such transportation would afford as to both sets of lines.

This is clear when we consider that cable companies which have no wire lines along the lines of railways were equally entitled to make contract with such railways for the exchange of services as telegraph companies which had wire lines along such railways. Any transportation for such cable company would be "off line" as to its lines, while not as to the Railway Company perhaps. Again, the Telegraph Company transmitting, as it is re-

quired under these contracts, messages for the Railway Company on its lines off the line of railway in points of the United States is just as much rendering an "off line" service so far as the Railway Company is concerned, as the Railway Company is rendering an "off line" service in transporting material for the Telegraph Company for use on its line not situated on the line of the railway. With these observations, the Telegraph Company begs to submit this case, leaving the argument in support of the appeal to the representative of the Interstate Commerce Commission.

Respectfully submitted,

RUSH TAGGART,
Attorney for the Western Union
Telegraph Company.

APPENDIX.

Exhibit A.

MEMORANDUM.

Memorandum of The Western Union Telegraph Company regarding its right to have material and supplies for so-called "up-town" offices transported under contract with the Chicago, Indianapolis & Louisville Railway Company.

* * * * *

The question here presented for a Conference Ruling of the Commission is an important one and involves the interpretation of the scope and effect of the amendment to Section 1 of the Interstate Commerce Law, approved June 18, 1910.

By that amendment section 1 was so changed as to bring within its provisions telegraph, telephone and cable companies engaged in sending messages from one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, and all the provisions of section 1 were made applicable to charges made for the transmission of messages by telegraph, telephone or cable companies, with the proviso, first, that there might be a classification of messages, and further, that "nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

The question with which we are concerned relates to the meaning of the provision just quoted.

By the terms of the submission of this matter to the Commission, the contract between the Western Union Telegraph Company and the Chicago, Indianapolis & Louisville Railway Company is admitted to expressly provide for the transportation by the railway company for the telegraph company, so far as may be legal, of all materials and supplies used in the maintenance of telegraph offices in towns or cities through which the railway passes and for telegraph lines extending from the right of way of the railway company to such offices, described in the statement as "uptown" offices. These up-town offices are clearly recognized by the contract, copy of which is attached hereto, and there is a further recognition of these offices in the 6th paragraph of the contract where it is provided that the telegraph company shall not establish any such offices where there is a telegraph office in the railway station and the railway is the only railway reaching said city. The reason for this is very evi-

dent when the contract is examined, because of the division of commercial receipts at offices established in railway stations.

The contract in its inception and fundamental provisions is one clearly contemplated by the proviso in the 1st section of the Interstate Commerce Law for the exchange of services in part and for the economical joint construction, operation and maintenance of lines of telegraph which, on one side entirely serve the interests of the railway company for its railway business, and on the other provide for public telegraphic facilities through the offices of the telegraph company.

The railway company, however, raises the question of whether under Conference Ruling No. 364 it is legally permissible for it to transport supplies for these "up-town" offices as above described. Conference Ruling No. 364 holds that a railway company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.

With this ruling we have not the slightest quarrel and believe it to be correct. The only question is whether the interpretation of the railway company is correct that in order to constitute "strictly company matters" it is necessary that the service be directly connected with an office or telegraph line jointly occupied or operated by the railway company and the telegraph company. This is practically the interpretation of the railway company and the result of its construction of Rule 364. The telegraph company's view of "company matters" is that the affairs of either company within the limits of a contract for an exchange of services is within the ruling of the commission.

Similar questions have arisen in different forms with other railway companies, but all these ques-

tions ultimately turn upon the proper construction of the proviso to section 1 of the Interstate Commerce Law above quoted, and it is with the meaning of that proviso, that this memorandum is concerned, not only with reference to the precise question involved here, but as a question of general import to the telegraph company and the railway companies with which it contracts.

The Commission in Conference Ruling No. 219 refers to its decision issued December 27, 1906, (which was prior to the amendment in question) in which it limited the right of a railway company to transport employees and material for telegraph companies for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation and maintenance of a telegraph line and service on its own line of railway.

This was the ruling of the Commission prior to the amendment to Section 1 of the Interstate Commerce Law, and in effect at the time of the amendment. Notwithstanding the amendment to the Interstate Commerce Act of June 18th, 1910, bringing under the operation of the act the telegraph, telephone and cable companies, and notwithstanding the fact that Congress in making such amendment, provided in broad and unequivocal language that the telegraph company and railway companies should be at liberty to enter into contracts for the exchange of service, some of the railway companies' counsel, in interpreting the contract and the amendment, practically interpret the proviso of the amendment as limiting the railway companies to such contracts only as would have been legitimate under the Commission's ruling of December 27, 1906. It is because of such narrow and restricted

construction of the amendment that the telegraph company considers the submission to the Commission of this matter of particular importance.

It is significant that the language used in the proviso contains no limitation upon the right of telegraph and railway companies to contract with respect to exchange of services. This is significant in view of the fact that such limitations had been placed upon the right of the telegraph and railway companies to contract by the ruling of the Commission above referred to, and Congress must be held thus to have legislated with such ruling in mind, and by use of the language granting the companies the unrestricted right to contract for the exchange of services, clearly to have intended to enable the companies to contract without the restricions or limitations imposed by the former ruling of the Commission. The intent of Congress clearly was to enable the telegraph company to transmit messages for the railway company and the railway company to transport employees and material for the telegraph company under such terms and conditions and to such an extent as they might agree upon, whether such materials were to be used upon the line of the railway of the contracting railway company or upon other lines of telegraph over which the railway, under the terms of the contract, would have the right to have messages transmitted as a part of the consideration for such transportation by the railway company.

The other provisions of Section 1 of the Act to regulate Commerce as amended June 18, 1910, respecting the exchange of passes and franks between the telegraph company and the railway company and other common carriers further show the intent of Congress to bring the telegraph company and other common carriers upon an equal footing, and

although perhaps not controlling, are persuasive in support of the contention of the telegraph company.

As an illustration of some of the forms the restricted construction of this proviso has assumed it has been contended by some railway companies that not only is this proviso limited as indicated by the view of the railway company in this particular case, but that it is also incumbent upon both the telegraph and the railway company, in making a contract for the "exchange of services," to specify the exact amount of such service to be rendered by each for the other, *i. e.*, the telegraph company must specify the value in dollars calculated at its regular rates to which it will transmit messages for the railway company, and the railway company, on its part, under a contract of this character for the transportation of material, whether for use on the line of railway of the company contracting or off the line, must designate the value of such transportation calculated at its regular tariff rates, and this in a contract providing for the joint construction, operation and maintenance of telegraph lines for the use of both parties, in which there are many valuable considerations furnished by both parties in addition to the transmission of messages and the transportation of men and materials by the respective parties.

If the contention of the railroad company that it cannot lawfully transport material for "up-town" offices is a proper one, it is important for the Commission to define the extent to which the obligations of both parties under the contract are limited with respect to the transmission of messages on the one hand, and the transportation of materials on the other.

The contention of the telegraph company, however, is that the effect of this proviso to section 1

of the act is absolutely to free the hands of the railroad company and the telegraph company from the limitations on their right to contract for exchange of services under the ruling of the Commission of December 27, 1906, leaving it to the discretion of the contracting parties as to the character and extent of the services which each shall render to the other; that when they thus contract—the one to furnish facilities for the transmission of messages over its entire telegraph system, and the other for the transportation of men and material, the transmission of the telegraph messages is clearly to be considered as an equivalent for the transportation of employees and material, taken in connection with the other considerations named in the contract, and that the two parties are "exchanging services" with respect to "strictly company matters" although the materials and supplies which the railroad company transports may be for use in purely commercial offices of the telegraph company along or beyond the lines of the railway company, and although the employees are transported in connection with the general commercial business of the telegraph company and not directly related to the telegraph business upon the railway transporting them.

As stated above the question here presented is not peculiar to the Chicago, Indianapolis & Louisville Railway Company, but relates to various contracts with railway companies throughout the country, and the importance of an accurate interpretation of the scope and effect of the proviso to Section 1 need scarcely be emphasized.

The Western Union Telegraph Company therefore respectfully asks that the Commission, in its ruling as to the scope and effect of this language in Section 1, give effect to the evident intent of Congress to secure to the telegraph company and the

railway company the full power to contract free from the limitations in existence at the time the amendment was passed.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY,

By RUSH TAGGART,
General Counsel.

NEW YORK, JUNE 4, 1913.

June 5, 1913.

Mr. H. R. KURRIE,
General Attorney,
Chicago, Indianapolis & Louisville Ry. Co.,
Chicago, Illinois.

Dear Sir: I beg to acknowledge the receipt of your letter of May 27 concerning the propriety of a railroad carrying free materials used in the construction and maintenance of telegraph lines which run between uptown offices of the telegraph company and the lines of that company on the railroad right of way, also the right to carry free the supplies used in such uptown offices. As the law stood prior to 1910 the Commission ruled in answer to a similar inquiry from the president of the Western Union Telegraph Company that a contract of similar purport was unlawful. At that time the Commission considered that the law confined the right of free or reduced rate transportation of men and supplies for telegraph companies to such men and supplies as were necessary for the construction, maintenance and operation of lines and offices used by the railway company, and held that such free or reduced rate transportation cannot be lawfully given to telegraph companies for men not so em-

ployed or supplies not so used. In the proceeding entitled *In the Matter of Railroad-Telegraph Contracts,* 12 I. C. C. 10, we said that we could not see that full performance of such contracts would affect any public or private law or interest adversely, but we found no law authorizing it. Subsequent to the amendment of the act of 1910 we issued Conference Ruling No. 364, as follows.

> EXCHANGE OF SERVICE BY TELEGRAPH AND RAILROAD COMPANIES.
>
> Under the amendatory act of June 18, 1910, it is provided, "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry, *Held,* That a railroad company and a telegraph company may exchange services *with respect to strictly company matters* on the basis of their agreement.

This conference ruling was made when the Commission had before it a contract between a railroad company and a telegraph company which contained similar provisions to those which you recite. It is my personal view that the supplies and material for use in offices and on lines that are located off the right of way of the carrier fall within the description "strictly company matters." I view the question, however, as of such importance as to require that it be considered by the Commission as a whole, and I will therefore present it to my colleagues in conference during the coming week and will advise you of the conclusion which they reach.

Very truly yours,

JAMES S. HARLAN,

Commissioner.

June 9, 1913.

Mr. H. R. KURRIE,
General Attorney,
Chicago, Indianapolis & Louisville Ry. Co.,
Chicago, Illinois.

Dear Sir: I brought before my colleagues in conference today the subject matter of your communication of May 27, with respect to a contract between your company and the Western Union Telegraph Company. And I am directed by the Commission to advise you that your company may lawfully transport free of charge materials used in the construction and maintenance of telegraph lines running from the lines on your right of way to so-called "uptown offices," and may also carry free the supplies used in those offices. The Commission holds that such transportation comes within Conference Ruling No. 364, which provides that a railroad company and a telegraph company may exchange services "with respect to strictly company matters" on the basis of their agreement.

I am sending a copy of this letter, also copy of my letter to you of June 5, to Mr. Rush Taggart, General Counsel of the Western Union Telegraph Company.

Very truly yours,

JAMES S. HARLAN,
Commissioner.

Exhibit B.

To The Interstate Commerce Commission,
Washington, D. C.

The Western Union Telegraph Company and the Central Vermont Railroad Company, under date of September 8, 1885, entered into a contract providing generally for the occupation of the railroad right of way, bridges and stations by a telegraph line, and for the joint operation of a telegraph business. A copy of the contract, which is still in force, is attached hereto.

In the seventh section of the contract, it is provided:

> "The Telegraph Company agrees to issue to such officers and agents of the Railroad Company as may be designated by the President or General Manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the Railroad Company, originating at or destined to points on the Telegraph Company's lines in the United States, beyond or off the lines of said railroads, to an amount not exceeding fifteen thousand dollars ($15,000.00) per annum for the first five hundred (500) miles of railroad constructed, owned, leased, or controlled and operated by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased or controlled and operated and occupied as aforesaid."

The ninth section provides that:

"The Railroad Company agrees to transport free of charge over its railroads, upon application of the Superintendent or other officer of the Telegraph Company, all persons in the employ of the Telegraph Company, when traveling on the business of said Company; and also to transport and distribute free of charge along the line of its railroads covered by this agreement, all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by this agreement, and of such additional wires or lines of poles and wires as may be erected under the provisions of this agreement. Also all material and supplies for the establishment, maintenance and operation of the offices along said railroads.

And the Railroad Company further agrees to transport without charge the poles and other material of the Telegraph Company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said Railroad Company, not exceeding one-third (1-3) of the amount of free telegraphic service which the Telegraph Company herein agrees to perform for the Railroad Company beyond the line of its railroads, and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles and other materials in excess of said amount. Settlement to be made yearly."

A question having arisen as to the right of the Railroad Company under the Interstate Commerce law as amended in 1910, to transport for the telegraph company materials and supplies for use of the lines of the railroads covered by the contract, in accordance with Section nine thereof, Mr. Rush Taggart, General Counsel of the Telegraph Company, on June 17th, wrote the following letter to Mr. C. W. Witters, Vice President and Attorney for the Central Vermont Railway Company:

"At the request of the Comptroller of this company, and upon the suggestion of the General Freight Agent of your company, I am writing you relative to the attitude of your company with respect to carrying material and supplies over its lines for use by the telegraph company on other lines.

I understand the position of your company to be that under the Interstate Commerce Act as amended in 1910, it is illegal for the railway company to carry such material and supplies in accordance with the provisions of the contract, and in support of this position, your General Freight Agent, in his letter of March 28, 1913, cites Conference Ruling of the Commission No. 219, issued in 1907 prior to the amendment to the Act bringing telegraph companies under the jurisdiction of the Act.

In section 1 of the act as amended, it is provided that, 'Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.'

Congress in making the amendment of course had before it the ruling of the Commission cited by your General Freight Agent, and the intention clearly was to allow the telegraph company and railway company to make such contracts for this

'exchange of services' as might in the discretion of their officers, seem proper.

Again, in Ruling 364, the Commission reiterates the rule that a railroad company and a telegraph company may exchange services with respect to strictly company matters, and although the question has been taken as settled by the railroads generally throughout the country, it was taken up recently by the Chicago, Indianapolis & Louisville Railway Company, and on June 9, 1913, the Commission, through Commissioner Harlan, laid at rest whatsoever doubt may have been raised by the use of the words 'strictly company matters' in Ruling 364. Commissioner Harlan in his letter to Mr. H. R. Kurrie, General Attorney for the Chicago, Indianapolis & Louisville Railway Company, says: 'I am directed by the Commission to advise you that your company may lawfully transport free of charge materials used in the construction and maintenance of telegraph lines running from the lines on your right of way to so-called "uptown" offices, and may also carry free the supplies used in those offices. The Commission holds that such transportation comes within conference Ruling 364, which provides that a railroad company and a telegraph company may exchange services "with respect to strictly company matters" on the basis of their agreement.'

The principle involved in the question raised by your company is, of course, identical with that involved in this recent ruling.

I confess that I have heretofore been unable to distinguish between the positions of the telegraph company and the railroad company under contracts similar to the one existing between your company and the telegraph company, and if the telegraph company can legally place at the disposal of the

railroad company its telegraphic facilities throughout the country, it is difficult to understand why the railroad company cannot legally transport materials for the maintenance and operation of the lines so constructed and operated.

However, as stated above, any question respecting the matter would seem to be put at rest by the recent ruling above quoted, and I trust that your company may see its way clear to adopt the rule now generally in force throughout the country."

To this letter the Attorney for the Railway Company replied as follows:

"This Company would like to extend to your Company every facility it lawfully can in the handling and carrying its material and supplies over its lines to be used by the Telegraph Company on other lines. But I am unable to see that the amendment of 1910 of the Interstate Commerce Act in any way changes the decision of the Commission of May 11, 1909, Vol. 16-246. But on the contrary, in my judgment, the amendment was made as an endorsement or confirmation of the above decision. I think the letter of Commissioner Harlan to which you refer in your letter to me of June 17th is clearly in line with the above decision.

The lines running from the railroad right of way to the 'up-town offices' are clearly in the interest of the road from which they lead, and not in the interest of or to be used by another road. Ruling 364 confirms rather than shakes the opinion I have all along maintained.

I regret as much as this Company does that the old practices and the former construction of the contract between your and this Company cannot now with safety be lived up to."

On September 10, 1913, Mr. Taggart, on behalf of the Western Union, again wrote Mr. Witters, Attorney for the Railway Company, as follows:

"I regret that you are unable to concur in the conclusions reached in my letter of June 17th, and feel that you give undue importance to the decision of the Interstate Commerce Commission of May 11, 1909, 16 I. C. C. Rep. 16, 246, and I find myself wholly unable to agree with your conclusion that the amendment to the act was made as an endorsement or confirmation of that decision. A clear statement of the situation will, I believe, wholly eliminate this conception of the attitude of either the Commission or Congress.

After the passage of the amendment of June 29, 1906, forbidding, in section 6, the transportation by railway companies for any greater, less or different compensation, the question as to the validity and enforcibility of the contracts between telegraph and railroad companies was for the first time brought up for consideration. At that time there was no question whatever concerning the right of the telegraph company, for it was not in any respect subject to the provisions of the act to regulate commerce. The question was solely with respect to how far the railway companies should carry out the provisions of their contracts providing for the transportation of poles and other materials of the telegraph company to be used by it beyond or off the lines of said railroad. Accordingly the matter was presented to the Commission and it issued its ruling on December 22, 1906, now forming Conference Ruling 219. The basis of this ruling, as I understand it, is that the telegraph company, in so far as materials and supplies for the operation of telegraph lines along the railroad or system of railroads, is simply doing for the railroad company what the railroad company is permitted to do for itself, namely, furnishing and operating a telegraph line; that this is, in effect, a

railroad function necessary for the operation of the railway, and in so far as materials and supplies are thus limited, it is simply a method which the railway company has adopted of securing in the most economical way a necessary facility, and therefore the ruling of the Commission was that, to that extent, these contracts were enforcible and properly to be carried out by the railway companies.

The decision of the Commission of May 11, 1909, to which you refer, proceeds upon precisely the same principles and supports the right of the railway company to contract with express companies to carry its men and supplies to the same extent to which the Commission had held it was permitted to contract with the telegraph company, for the reason that the express company carries that which the railway company could be required to carry along and upon its own line in the absence of a contract with the express company.

When the amendment of 1910 was made, however, for the first time bringing the telegraph company under the operation of the act, section 1, after clearly defining that the provisions of that section applied to and covered the transmission of messages by the telegraph company between different states and to and from foreign countries, contains the express provision that 'nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.' Observe, please, that there is no limitation here upon the manner in which the companies may contract; there is no limitation that the railway company shall transport for the telegraph company only materials and supplies for use on its own lines. Indeed no such reservation of the right under the rul-

ings of the Commission was necessary because without anything in the act itself referring to such contracts the Commission had ruled that the railway company had such a right, so that this provision was not necessary to cover that feature of the situation. Nor was it necessary for the telegraph company, under the principle of the ruling of the Commission to which attention has been called, to have any such proviso because on the same principle under which the railroad company would be permitted to provide these facilities for the telegraph company, the telegraph company would have the right to make such contract with the railway company to enable it to secure the most economical and practical facilities for the transaction of the business for which it was organized, *i. e.*, the transmission of intelligence by wire throughout the United States.

It was, therefore, it seems to me, the clear intent of Congress, as indicated by the plain meaning of the language used, that while the telegraph company was thus brought under the provisions of the act, nothing in the act was to be construed as limiting the telegraph company on the one hand, to contract for the transmission of messages for other carriers, nor, on the part of the railway companies, to limit them in making contracts with telegraph companies for furnishing to the telegraph companies transportation of men and property, the only limitation being that there should be an exchange of services as expressed in the act—the transportation on one hand and the transmission of messages on the other, the extent of the same to be furnished by either of the parties to be left to the discretion of their officers.

The subsequent rulings of the Commission have all been in that direction. Ruling 364 limits the

exchange of services to matters which are strictly company matters, *i. e.*, the railway company is limited in exchanging services with the telegraph company to the extent that transportation can be furnished the telegraph company only with respect to matters which are 'company matters' of the telegraph company, and, on the other hand, the telegraph company is limited to making these arrangements for the transmission of messages concerning 'company matters' of the railway company.

The conclusion that it was not the intent of Congress to limit the transportation of material and supplies to those for use on the particular line of railroad would seem to be irresistible when we consider the language of the provision that nothing in the act shall be construed to prevent 'telephone, telegraph and *cable* companies from entering into contracts,' etc., as cable companies in the very nature of the case, are not located upon or along the right of way of railway companies with which they contract. The railway companies contracting with a cable company would, therefore, of necessity, carry material and supplies of the cable company although none of the cable company's lines are situated upon or along the railroad right of way.

The extent of the matter with which Commissioner Harlan deals in his letter is of course limited to up-town offices. With respect to these up-town offices, it may be said that they are no more in the interest of the railway company from whose right of way the wires may radiate than they are in the interest of any other railroad company, because they are entirely separate and distinct, and for the most part the wires connecting these offices do not connect with railroad offices at all, but are purely commercial wires of the telegraph company for its commercial business exclusively and in no way

whatever contributing to the service on the railroad or that portion of the railroad. They are as separate and distinct in that respect as the wires on another road, the sole interest of the particular railroad in such up-town offices being their privilege of sending over the wires connecting such offices, under franks issued by the telegraph company, messages relating to the business of the railroad, in accordance with the other provisions of the contract, but this same privilege is also extended to any other railroad.

I therefore beg to submit these considerations and believe that upon reconsideration of the question you will see that a proper construction of the contract will not only permit your company legally to perform this transportation service, but that due regard to its contract obligations with the telegraph company requires that it should do so."

In reply to the above letter, which also contained a postscript suggesting the submission of the matter for the decision of the Interstate Commerce Commission in case the railway company could not concur in the conclusions thereof, Mr. Witters, Attorney for the Railway Company, under date of September 12, wrote Mr. Taggart, Attorney for the Telegraph Company, as follows:

"There is sound reason and much force in what you say; but still I cannot believe that under the rulings of the Commissions and the opinions rendered by our courts that this company can lawfully transport property of the Telegraph Company free, or under agreement, to be used upon another line than its own.

Nothing would please me or this Company more than for the Commission to adopt your views rather than mine. I will gladly agree upon a statement for submission to the Commission."

It is therefore the desire of the Railway Company and the Telegraph Company that your Honorable Commission will make a ruling whether under the contract in question the Railway Company can, under the provisions of the Interstate Commerce Law, legally transport poles and material for the Telegraph Company for use by the Telegraph Company beyond or off the lines of the Railway Company.

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART,
General Counsel.

CENTRAL VERMONT RAILWAY COMPANY,
By C. W. WITTERS,
Vice-President and Attorney.

Dated September 25, 1913.

Exhibit C.

November 22, 1913.

MR. RUSH TAGGART,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York City.

Dear Sir: Further replying to yours of September 30, 1913, in which you submit to this Commission a question which has arisen between you and the Central Vermont Railway Co. That question, as I understand the papers submitted, is this:

May a railroad company under contract with a telegraph company for an exchange of services transport over its lines, without applying its tariff rates, the materials and supplies of the telegraph company which are not to be used by it along the right of way of the railroad company.

This Commission originally held that a railroad company might contract with a telegraph company for the free handling of its materials and supplies which were to be used along the right of way of the railroad company in the maintenance of the line of the telegraph company, but that it must apply its tariff rates to the transportation of such articles when passing over the line of the railroad company for use at points off its own right of way. In consequence of this the telegraph companies applied to Congress and secured an amendment of the act. Under the act as so amended, and as it now stands, we have been forced to hold that under a contract of this kind the railroad company may handle, without reference to its tariff rates, the property of the telegraph company, both when for use upon the line of that railroad company and also when passing over its line for use elsewhere.

Truly Yours,
C. A. PROUTY,
Commissioner.

Exhibit D.

INTERSTATE COMMERCE COMMISSION.

WASHINGTON, April 6, 1914. K.

Mr. RUSH TAGGART,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York, N. Y.
Mr. C. W. WITTERS,
Vice President, Central Vermont Railway,
St. Albans, Vt.

Gentlemen:

Under date of September 13, 1913, Mr. Taggart sent to the Commission an agreed statement of

facts in a controversy between your respective companies, relative to the right of the railway company under the provisions of a contract entered into between it and the telegraph company to transport materials and supplies for use by the telegraph company beyond or off the lines of the railway company.

Under date of November 22, 1913, Commissioner Prouty wrote Mr. Taggart, stating that the Commission held that under a contract of this kind the railroad company may handle, without reference to its tariff rates, the property of the telegraph company, both when for use upon the line of that railroad company and also when passing over its line for use elsewhere.

That question is now again presented to the Commission, and I am directed by the Commission to say, that pending further inquiry by the Commission the above expression of Commissioner Prouty on behalf of the Commission is withdrawn. The Commission directs me to request you to submit for its consideration briefs presenting your respective views on the subject and your reasons in support thereof.

I trust that it will be convenient and agreeable to you to get these briefs to us promptly, and I make free to suggest that you send at least seven copies of each brief to the end that each Commissioner may have full opportunity to read and study same at his convenience.

Yours truly,

E. E. CLARK,
Commissioner.

Exhibit E.

INTERSTATE COMMERCE COMMISSION.

In the matter of the enforcement of the contract between the Western Union Telegraph Company and the Central Vermont Railroad Company.

Brief of the Western Union Telegraph Company, filed in obedience to request of the Interstate Commerce Commission contained in its letter of April 6, 1914, addressed to the General Counsel of the Telegraph Company and to the Vice-President of the Railroad Company.

The telegraph company begs herein to submit to the Commission its views respecting the question in controversy between the telegraph company and the railroad company, which was heretofore dealt with by Commissioner Prouty in his letter, dated November 22d, 1913, addressed to Mr. Rush Taggart, General Counsel of the telegraph company.

For the information of the Commission the telegraph company attaches hereto as Appendix No. 1 the statement of facts and memorandum accompanying the same, which was before Mr. Commissioner Prouty and which formed the basis for his letter of November 22d above mentioned.

Prior to the submission of the controversy with the Vermont Central Railroad, a somewhat similar question had arisen with the Chicago, Indianapolis & Louisville Railroad Company, which was likewise informally submitted to the Commission under date of June 4, 1913, and which was considered by

Hon. James S. Harlan, Commissioner, in his letter of June 5, 1913, addressed to Mr. H. R. Kurrie, General Attorney for that railroad company. The statement of facts and the letter of Mr. Commissioner Harlan are attached hereto as Appendix No. 2.

Analysis of the contract between the Western Union Telegraph Company and the Central Vermont Railroad Company.

This contract recites, first, the ownership of certain railroads by te railroad company; second, the ownership by the telegraph company of certain telegraph lines along such railroads; third, the expiration of some pre-existing contracts and the necessity for a new contract in the interests of both parties.

After mutual releases contained in the first article of the contract, the second article provides that the telegraph company undertakes to furnish all materials for the new lines of telegraph which may be necessary, and for the maintenance, operation, repair and reconstruction of existing lines; also instruments, batteries, etc., for the operation of the offices along the railroads including the use of main batteries. In the third article the railroad company agrees to furnish all the unskilled labor necessary for the construction, maintenance, repair and reconstruction of the telegraph lines for which the telegraph company is obligated to furnish the material under the first article. The telegraph company furnishes the skilled labor, including a skilled foreman to direct the labor furnished by the railroad company. The fourth article deals with the

extent of the railroad company's right of use in the telegraph company's lines and the method by which the railroad company may procure additional facilities under certain conditions. The sixth article secures to the railroad company the free use of any telegraphic patents owned by the telegraph company. By the first paragraph of the seventh article the right of transmission between all stations on the lines of railroad for all messages relating to the railroad business of the railroad company is secured to the railroad company. The second paragraph reads as follows:

> "The Telegraph Company agrees to issue to such officers and agents of the Railroad Company as may be designated by the President or General Manager thereof, annual franks, authorizing the free transmission of messages relating strictly to the railroad or corporate business of the railroad company, originating at and destined to points on the Telegraph Company's lines in the United States, beyond or off the line of said railroads, to an amount not exceeding fifteen thousand dollars ($15,000) per annum for the first five hundred (500) miles of railroad constructed, owned, leased or controlled and operated by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and six dollars ($6.00) per annum additional for each additional mile of railroad so constructed, owned, leased or controlled and operated and occupied as aforesaid.
>
> The tolls on all of such messages to or from points beyond or off the line of said railroads shall be calculated at the regular commercial day rates fixed by the Telegraph

Company, between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one-half of the aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly. Messages sent by the Railroad Company on its railroad business over wires operated by it, destined to or received from points off the line of its railroads and in the territory of another Telegraph Company working in connection with the Western Union Telegraph Company, shall be treated as local between points on the line of the railroads covered by this agreement.

By the eighth article it is provided that either party may establish telegraph stations at such points on said railroads as it might deem necessary, and that at all such stations which the railroad company establishes for its business the telegraph company shall supply instruments, local batteries and blank form and stationery for commercial business, and the railroad operator is to transmit and deliver exclusively for the telegraph company such commercial or public messages as may be offered, at the tariff rates of the telegraph company, and render an account to the telegraph company of the telegraph business thus sent.

By the ninth article the railroad company agrees to transport free of charge all persons in the employ of the telegraph company traveling on the business of the company; also to transport and distribute free of charge along the line of its railroads all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by the agreement, *i.e.*, the lines and wires along the lines of the railroads

as they may exist from time to time during the term of the contract, and also all materials and supplies for the maintenance and operation of offices along the railroads.

Then follows the provision of the contract under which the controversy here considered arose:

> "And the Railroad Company further agrees to transport without charge the poles and other material of the Telegraph Company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said Railroad Company, not exceeding one-third (1-3) of the amount of free telegraphic service which the Telegraph Company herein agrees to perform for the Railroad Company beyond the line of its railroads, and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles and other materials in excess of said amount. Settlement to be made yearly."

In the tenth article there is a provision for the telegraph company, under certain conditions opening an independent office in the stations of the railroad company if it so elects.

The eleventh article deals with the grant by the railroad company of a right of way to the telegraph company along the railroads.

The twelfth article deals with the conditions under which each company will exonerate the other with respect to losses arising from negligence of the servants of each company.

The thirteenth article provides for the appointment of a superintendent who shall be the joint agent of the two companies, and the method of providing for his compensation.

The fourteenth article is a general provision that all the telegraph lines and wires covered by the agreement shall form a part of the general system of the telegraph company and subject, in the commercial department thereof, to the rules and regulations fixed by the telegraph company.

These are the substantial provisions of the contract determining the considerations given by each party and the contributions of each to the construction, maintenance, operation, repair and reconstruction of the lines in existence at the time the contract was made, and of new lines which may be constructed after the making of the contract.

Inasmuch as the controversy is based upon the provisions of the contract which are, to a certain extent, typical of the great majority of contracts between the telegraph company and railroad companies throughout the country (all of which are on file with the Commission) it is proper to call attention to some features in which some of the contracts differ in details, although similar in principle.

The vast majority of contracts deal with the question of the contributions of the companies respectively to the line substantially as this contract does, the telegraph company usually furnishing the materials and the railroad companies the labor. The uses of the lines thus constructed by the contracting parties respectively are usually in substance practically the same as in this contract. The right of the telegraph company to have its messages transmitted by railroad operators at telegraph stations opened by the railroad company for the operation of its railroad is substantially uniform. There are slight differences respecting the proceeds of this commercial business, some contracts giving all of the proceeds to the telegraph company and other giving a certain portion to the railroad company, the division being governed by other considerations in the contract.

The provisions of this contract respecting the transmission of messages by the telegraph company for the railroad company to a specified amount obtain in nearly all of the contracts. In some contracts, unlike this one, there is a provision that such messages may be transmitted over Western Union wires between points on the line of the railroads, while this contract limits such transmission to messages beyond or off the line of the railroad between Western Union officers and over Western Union wires under franks issued under its provisions.

So, likewise, with respect to transportation by the railroad company, this provision differs in different contracts. In some contracts the transportation is limited to material to be used upon the lines and for offices on the particular line of railroad, in others it is extended, as in this contract, to material for use beyond or off the lines of the railroad.

In all cases, however, the question is one of give and take as between the telegraph company and the railroad company in view of the peculiar conditions surrounding each particular property, the general principles and considerations underlying each contract, however, being the most economical and best way of securing for the railroad company the necessary telegraphic facilities for the operation of its railroads, and for the telegraph company the best and most economical means of securing facilities for the transmission of messages for the government of the United States and the public generally.

Development of Telegraph Facilities.

It is proper in this connection to call attention

to the historical development and analysis of such contracts between the telegraph companies and railroad companies.

While it is true that the very earliest telegraph lines were "highway lines" designed primarily for the transmission of intelligence for the government and individuals in commercial transactions, yet almost immediately thereafter in the application of the telegraph to practical use there was a connection or association with railroad companies either directly or indirectly; in some cases the relations took the form of a grant or permit to erect a telegraph line along the right of way of the railroad and the telegraph company undertook the transmission of information for the railroad company; in other cases this was done by contracts with companies whose lines were constructed on highways parelleling the railroad, but very early in the development of the railroads and the telegraph it became apparent that the speedy transmission of information was a most valuable adjunct in the operation of railroads, and it developed that before many years had elapsed contracts were being made between the telegraph companies then in existence and the railroad companies, and more and more the railroads were learning to use the telegraph as an aid in the more speedy and safe operation of their trains, and so it came to pass that very early the railroad companies were employing regular dispatchers to transmit telegraphic train orders. After that the development was very rapid, particularly during the civil war when enormous pressure was put upon the railroad companies in the use of their facilities.

The contracts made in carrying out this connection between the railroad and telegraph companies naturally varied in their terms, but as the telegraph business became more uniform and was

handled more and more by companies operating under the same general conditions, the natural result was that the contracts likewise became more uniform, until, as above stated, the contracts at the present time, while differing in many details, have the same general characteristics.

The economical and business reasons for the existence of these contracts is apparent; the telegraph company requires a speedy means of reaching all parts of its lines of repairing breaks caused by storms, and this facility is afforded by the railroad companies; the telegraph company also requires speedy methods of transporting its material and distributing it where needed. The advantages of a railroad line over a highway line are therefore manifest provided the same can be obtained upon reasonable and proper terms. The lines constructed by the telegraph company would supply a line of poles and wires capable of carrying not only all facilities necessary for the telegraph company but an ample surplus for the facilities needed by the railroad company, and it is therefore quite evident that the economical advantages of using one pole line for carrying all the wires of both companies was an expedient which would inevitably be resorted to, and as ample space is afforded upon the right of way of the railroad company it is likewise quite evident that such lines would naturally be erected on the right of way. This association of the two companies in the production of telegraphic facilities has resulted in the wide development of the telegraph for commercial uses to an extent which would have been impossible but for the use of the railroad company's right of way and stations, there being now in the Western Union System over twenty-five thousand (25,000) offices affording telegraphic facilities in the United States, over twenty-one thousand (21,000) of which do not pay

more than $25.00 per month in commercial business and has also saved large sums to the railway companies in the operation of their railways.

These general arrangements all had their origin in the early history of the railroad companies, and with such changes as have been necessitated by changing conditions, have continued until the present time. Such was the general state of affairs when in March, 1887, the act of Congress to regulate commerce was passed.

No question was made, or could be made, as to the propriety of these contracts in any of their provisions under any of the sections of the act, because they were evidently arrangements proper to be made by the railroad companies to secure needed telegraphic facilities, and the facilities furnished by the railroad companies to the telegraph companies were not in any respect discriminatory nor did they constitute an unreasonable preference with respect to the transportation of employes and property of the telegraph company.

Following the subsequent amendments to this act, and particularly the amendment to section 6, made June 29, 1906, the question arose as to the right of the railroad companies to transport employes and material for the telegraph companies. No question was at that time raised as to the right of the telegraph companies, on their part, to contract for furnishing the facilities contracted by them to the railroad companies.

The question as to the railroad companies was presented to the Commission on the 27th of December, 1906, by the petition of the Western Union Telegraph Company and the Postal Telegraph-Cable Company, and the conclusion of the Commission on that question is contained in Conference Ruling No. 219, reading as follows:

"June 3, 1907.

219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES. (a) In its decision on the petition of the Western Union and Postal Telegraph Companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employes or property for any greater or less or different compensation that that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph lines and service on its own line. It was held that a group of separately incorporated roads, recognized as a 'railroad system' may be considered as one in the making of contracts for telegraph service on that system. (See Rulings 95-a, par. 2 and 161; see also amendatory act of June 18, 1910, interpreted in Ruling 305.)

(b) This definitely differentiates between the employes of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of dead head franks, send messages on railroad business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such

> relationship with the business of the railways as to warrant treating it is a part of of the operating facilities of such railways. Practically all telegraphing so done is off the line' business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (See Ruling 305.)"

This ruling definitely differentiated between the lines of telegraph upon the lines of a railroad company and the lines of telegraph which are off the line of the railroad company, and, as we understand the ground of the ruling respecting the right of a railroad company to transport men and material, it was upon the fundamental principle that a railroad company having need for a telegraph line to operate its railroad, might supply that need by itself building a line or using any agency for the construction of such line as might most economically and efficiently enable it to secure the desired facilities, and that the arrangement with the telegraph company was therefore an entirely proper arrangement; and that the transportation of men and material, as a part of such arrangement, was simply a method by which it was supplying that need for a necessary part of its railroad, and to that extent, notwithstanding the prohibitions of section 6 of the Interstate Commerce Law, the action of the railroad company was proper as to the lines of telegraph on its own railroad.

This is in accordance with the principles underlying Case No. 1985, reported in Vol. 16 of the I. C. C. reports, page 246, entitled "In the Matter of Contracts with Express Companies for Free Transportation of Their Men and Materials over Rail-

roads," the theory of that decision being that inasmuch as it was the duty of the railroad company to furnish the public with facilities for the rapid transportation or express transportation, and might do so either directly through its own employees or by a contract with an express company, it was proper for a railroad company to contract for that performance of such service exclusively with an express company, and that as a part of such contract it might provide for the transportation of men and supplies needed to enable the express company perfectly and completely to perform its duties. Indeed, in that case the prior decision of the Commission in the matter of railroad and telegraph contracts, 12 I. C. Rep. is cited to the same effect.

This decision follows the former decision respecting the existing contracts between railroad and telegraph companies for the transportation of men and materials. Such transportation as to the line of the railroad was upheld as proper, but as to transportation beyond or off the line of the particular road—as to the railroad companies—such transportation was prohibited because of the express provisions of section 6 as amended. The contracts with respect to transmission of messages by the telegraph companies for the railroad companies beyond or off the lines of the railroads were not affected by this ruling for the reason that telegraph companies were not then in any respect subject to the provisions of the act to regulate commerce, and no prohibition applied to them except the general common law provisions concerning the transmission of messages over their lines.

Matters were in this condition when Congress, on June 18, 1910, after a protracted consideration of all the provisions of the Act, adopted the amendments now in force and under which the rights of the parties are to be decided.

The Present Act.

In the first section of the act there was an amendment making the act applicable to telegraph companies in the same manner as to other common carriers, and providing that:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; PROVIDED, That messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: AND PROVIDED FURTHER, That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

In the part of the first section relating to the issuing of free transportation, we find the following:

> "And Provided Further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their

families of other common carriers subject to the provisions of this act."

It is significant, and a fact worthy of especial note in this connection, that section 6, which had theretofore been applied only to common carriers engaged in the transportation of persons and property, was not made specifically to apply to telegraph, telephone and cable companies which were brought within the provisions of the act by the first section.

We are therefore brought to a consideration of the question as to the effect which is to be given to the amendment to section 1 of the act. The proviso last above quoted, relating to the issue and exchange of passes and franks evidently applies to strictly "free" or complimentary service to the officers, agents, employees and their families of the telegraph companies and the officers, agents, employees and their families of other common carriers, and may therefore be laid aside as having no application to the question before us, for the reason that the transportation of men and materials and the transmission of messages, while spoken of in many of the contracts as being "free" service are not, strictly speaking, "free" service, but service rendered upon valuable consideration on each side.

We must, therefore, consider the meaning, scope and effect of this language, "Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

This language is either declaratory of the pre-existing rights of common carriers and telegraph companies, or it is intended as an extension of the rights beyond those in existence when the amendment was made.

If it is declaratory simply of the pre-existing rights of the companies, it would be in effect a mere declaration of the principle upon which the Commission proceeded in announcing Conference Ruling No. 219, that the railroad companies, as hereinbefore indicated, could either directly through their own employes, or indirectly contract for the construction and operation of telegraph lines along their own railways, and as a part of such construction, maintenance and operation, arrange for the exchange of services with the telegraph company on the lines of the railroad company as a part of the consideration passing between the companies with respect to the construction, operation and maintenance of such lines.

If, however, it is contended that this is the scope and effect of this proviso contained in the amendment to Section 1, then it is suggested that there was absolutely no reason whatever for such language being inserted with such evident care in the amendment of June 18, 1910, for the ruling of the Commission in Conference, No. 219, on the application of the Western Union and Postal Companies, and the decision already cited respecting express company contracts, had definitely decided that the railroad companies had such power under the act, notwithstanding the very drastic provisions of section 6 of the amendment of 1906 as made applicable to such railroad companies, and it was not necessary to put such language into the act in order to reserve the power to the telegraph company because the mere bringing of the telegraph companies under the provisions of the Act would not of itself, differentiate the telegraph companies in that particular from the railroad companies. It therefore follows that if it be held that this language is merely declaratory of the right to exchange services between telegraph and railroad companies with respect to telegraph lines which

are co-terminous with the railroads, such language is absolutely unnecessary and superfluous.

The presumption obtains that Congress did not intend to do an unnecessary and superfluous thing in inserting this clause in the amendment of 1910, but that it was intended to confer powers to the contracting parties, which but for the proviso would not be possessed by them in view of both having been subjected to the act, and, therefore, to leave telegraph and railroad companies to contract with each other for the exchange of services with respect to lines beyond or off the line of the particular railroad.

The question is then how far and to what extent such companies may enter into contracts for the exchange of services.

The first suggestion which is urged with respect to this language is that no limits are put upon the extent to which these companies are authorized to contract with each other for the exchange of services. The railroads companies, as common carriers, have for sale the transportation of persons and property, the cost and value of which are well known to the officers and directors of those companies; the telegraph companies have facilities for the transmission of messages to all parts of the country, such facilities having a value well known to their officers and directors. The railroad companies need the facilities which the telegraph companies can furnish and the telegraph companies need the transportation and other services furnished by the railroad companies; each needs the service rendered by the other in connection with the transaction of its business, and each is well qualified to judge of the value to it of the services the other can render to it, and in this condition of affairs Congress inserted the proviso that nothing in the act shall be construed to prevent the one

from entering into contracts with the other for the exchange of services; the language is quite clear and simple and contains no limitations upon the rights thus granted. It is submitted that considerations of extraordinary weight arising from the situation of the parties or from public policy, are needed to support a decision that Congress, although using this clear and explicit language, intended that the right be hampered by unexpressed limitations.

If it be held that the railroad company is limited to the transportation of material for use on the lines of telegraph on its own right of way or a system of railroads, and the telegraph company is free to contract with reference to its entire system, then we have the peculiar situation presented that, although the railroad has an interest in the construction, maintenance and operation of the telegraph line beyond its own line of railroad for its own uses, and employs the agency of the telegraph company in supplying this need, yet by reason of section 6 of the act, the railroad company is limited to the transportation of men and material for telegraph lines for use on its own right of way, while the telegraph company is called upon to give services upon its lines of telegraph wherever situated. If, for instance, there are five railroads extending, end to end, from New York to San Francisco, each of the companies makes a contract similar to the one before the Commission. The telegraph company supplies the material, instruments, etc., for the construction of the line from New York to San Francisco, over which are to be transmitted telegraphic messages for the government, the public in general, and each of the railroads with which the telegraph company has contracted. If the principle other than that contended for by the telegraph company should be maintained, we would have the very curious anomaly of the tele-

graph company being obligated under its contracts to transmit messages from New York to San Francisco over the system of telegraph lines thus constructed for each of the railroad companies, and the respective railroads absolutely prohibited from transporting men and materials necessary to build and keep the line in repair for the purpose of sending their own messages among others.

Further, if the respective railroad companies are each prohibited from transporting men or material except for use on its own line of railroad, will not the same rule apply to the service to be rendered by the telegraph company, since it also has been brought under the provisions of the Interstate Commerce Act? If the telegraph company undertakes to transmit messages beyond or off the line of the particular railroad under the terms of its contract up to the specified amount, for no other consideration than that named in the contract, and for the amount beyond that specified to receive half rates, is it not very clearly violating sections 2 and 3 of the act by receiving less compensation from the railroad company than it charges, demands, collects and receives from other persons for doing a like or contemporaneous service? Is it not creating an undue and unreasonable preference by reason of favoring the railroad company as against all others using its lines?

The proviso in no manner suggests an intention on the part of Congress to distinguish between the limitations imposed upon the railroad company and those imposed upon the telegraph company in making these contracts for the exchange of services. It is therefore respectfully submitted that both parties are upon an exact equality with respect to the right to contract for this exchange of services—the railroad company so far as the transportation of passengers and property is concerned

and the telegraph company so far as the transmission of messages is concerned.

It may be contended that the provisions of section 6, that:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

prevents the railroad company from transporting men or material for use beyond or off the line of the railroad, and that the provisions do not apply to the telegraph company, and that there is, therefore, a distinction between the two thus made in the act itself.

It is conceded that the language of section 6, in requiring schedules to be filed and in other features, applies in terms to the transportation of passengers and property, and that the Commission has not as yet determined whether the provisions of that section apply in any respect to telegraph companies.

Of course, if the provisions of section 6 do apply to telegraph companies, then all the provisions apply, and there is no distinction between the telegraph company and the railroad company in this

respect; and if the language quoted above prevents a railroad company from transporting men and material for use off its line, it would likewise apply to a telegraph company and prevent the transmission by it of messages for the railroad company beyond or off the line of railroad. If, however, section 6 is considered as applying to the transportation of passengers and property only, then the question arises as to whether or not it creates such a distinction in the respective positions of the companies in view of the amendment to section 1, as will limit the railroad company to the transportation of men and material for use on telegraph lines on its line of railroad, and allow the telegraph company to transmit messages upon its lines, whether situated on or off the line of the railroad company.

The language quoted from section 6 evidently is limited in its application to the transportation of passengers and property upon the regularly published rates, fares and charges, which, by sections 2 and 3 are required to be uniform for all persons without any discrimination whatsoever, and the consideration for such transportation, by the provisions of section 6 of the act, must be identically the same consideration as in the case of transportation for all other persons. If this language quoted from section 6 is considered as applying to the transportation of men and material for the telegraph company, the railroad company would be prohibited from carrying men and material for use on telegraph lines on its railroad equally as much as for use beyond or off its line of railroad, because it would be transporting the men and material for a "different compensation" from that for which passengers and freight, under similar conditions, are transported for other persons.

The effect, however, of the proviso quoted from section 1 is to withdraw the transportation of men

and material for telegraph companies under contracts for exchange of services, from the same classification under which passengers and property are transported upon schedules filed under section 6, and to differentiate the compensation in all respects from the rates, fares and charges upon which the railroad company transports for other shippers.

In short, section 6 deals with the relation of the railroad company to shippers as the term is generally understood, and the proviso to section 1 deals with the relations between the telegraph and railroad companies under a contract by the parties unitedly joined together for the construction, maintenance and operation of a system of telegraph lines for the use of both parties and the public.

It seems inevitably to follow that unless the proviso in question is construed as extending to each of the companies the identical right to contract at its discretion and judgment, the limitation must apply equally to both, and each can furnish service only with respect to the distance the right of way of the railroad company is occupied by the telegraph company's lines, which are the subject matter of the contract.

However, as we have heretofore endeavored to point out, the interests of the public and the interests of the two parties very clearly require the simple interpretation of the act which we have contended for—namely that the telegraph company may determine on its part the extent of the services which it desires to exchange with the railroad company, and the railroad company, on its part, may decide upon the services it will render the telegraph company in exchange therefor, the only limitation being that announced in Conference Ruling No. 364:

> "Exchange of Services by Telegraph and road Companies:——Under the amendatory act of June 18, 1910, it is p(rovided 'That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service.' pUon inquiry, HELD, that a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement."

This ruling quite properly requires that the service to be rendered by one company to the other shall relate strictly to company matters, and, as we understand the ruling, with that limitation, the parties are left free to contract.

The foregoing argument has been based upon the application of this language of the act to telegraph companies alone in connection with contracts with railroad companies, as we are advised that contracts between telephone companies and railroad companies for the exchange of services are at this time very rare. Their number may increase with the development of the telephone business and the application of the telephone service to the requirements of railroad business. In such case, of course, substantially the same reasons would apply.

But when we consider the application of the language of the amendment to "cable companies" we have a clear indication that it was not the intention of Congress to limit this exchange of services to lines of the transmission company actually located upon the right of way of the other carrier. The provision is that nothing in the act shall be construed to prevent "telephone, telegraph and cable"

companies from entering into contracts for exchange of services.

The cables or conductors of a cable company are laid under navigable waters, and such companies have no system of lines paralleling or co-terminous with the lines of a railroad, and yet Congress, putting all three companies into the same class, has given telegraph and telephone companies the same power to contract for exchange of services as is given the cable companies

It is obviously impossible to limit the right of a railroad company to contract with a cable company for the transportation of material over the railroad unless that road is occupied by a cable line; to give such a construction to the language would entirely nullify the act. As an illustration, let us consider a cable company whose line extends from New York City or Coney Island to London. Will it for a moment be contended that under the amendment of 1910 such a cable company cannot lawfully enter into a contract with a railroad company extending, say from New York to Chicago, under the provisions of which the railroad company shall transport from Chicago to New York the cable and other material necessary for use on the cable line between New York and London, and on the other hand, the cable company binds itself to transmit certain cable messages for the railroad company in exchange thereof?

This may be an extreme illustration, but a consideration of this illustration, together with the entirely reasonable construction of the contract contended for by the telegraph company will, we think, convince the Commission that the ends of justice and even a strict construction of the amendment, require that the railroad companies be not

limited under their contracts to the transportation of material for use on the particular road.

Respectfully submitted,

RUSH TAGGART,
Attorney for Western
Union Telegraph Company.

Exhibit F.

INTERSTATE COMMERCE COMMISSION,
Office of the Secretary.

Washington, July 15, 1914.

Mr. Rush Taggart,
General Counsel, Western Union Telegraph Co.,
195 Broadway, New York, N. Y.

Dear Sir:—

For your information I am enclosing herewith a copy of a conference ruling agreed upon by the Commission to-day. In this connection I am instructed by the Commission also to advise you that the letter of Commissioner Prouty, written under date of November 22, 1913, is withdrawn.

Respectfully,

A. HOLMEAD,
Acting Secretary.

Enclosure.

Upon inquiry as to whether or not under the provision in Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and

cable companies"), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said raiload for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

Exhibit G.

New York, September 17, 1914.

Hon. Edgar E. Clark, Chairman,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Under date of July 15th your Commission issued a conference ruling respecting the scope and effect of the provisions of section 1 of the Interstate Commerce Act concerning the exchange of services be-

tween telegraph and railroad companies, the ruling reading as follows:

> "Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under section 6 of the Act, HELD, That while said carriers may contract for an exchange of service, such service must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

The question of the effect of this ruling upon

the relations between the telegraph company and railroad companies has arisen in several aspects, and I desire to procure the interpretation of the Commission upon the same.

(1) Recently, in connection with a contract with an express company the question arose whether the parties could contract for the exchange of services to a fixed amount, say $60,000 per annum of transportation on the one hand and transmission of messages on the other calculated at regular rates of each party, with the provision that if the service rendered by either to the other did not equal the $60,000 the deficit or balance would be treated as settled.

(2) Whether in such a contract the parties may contract for the payment for excess over the fixed annual amount at one-half the regular rates for the transportation of property or for the transmission of messages.

(3) In many of the contracts with railroad companies it is provided, as one of the considerations, that the railroad companies shall transport, for use on the line of the railroads, materials of the telegraph company, without any limitation as to the amount of such transportation, and the telegraph company, on its part, undertakes to transmit for the railroad companies under franks issued to railroad employes messages relating to the business of the railroads up to a certain definite amount, usually calculated at a certain sum per mile of railroad covered by the contract, such amount being ascertained by applying commercial day rates to such messages, with a provision requiring the payment of half rates for any excess over the stipulated amount. The question arises under the recent conference ruling whether such a contract is permissible.

(4) Again in other cases the amount of messages transmitted by the telegraph company for a

railroad company is not limited but is determined solely by the needs of the railroad company. There are not many such contracts in existence at this time, but the question arises under the conference ruling whether such a provision is permissible.

(5) Further, the question arises whether the other considerations named in the contracts, such as the furnishing of facilities by the telegraph company to the railroad companies, the exchange of materials, and other provisions forming the real basis of the contracts, may be offset against transportation services by the railroad companies, or whether the purport of the conference ruling is that the exchange of services must be in equal amounts by each contracting party without regard to other considerations named in the contract and which in reality form the basis of such contracts.

Is it the intention of the Commission, under this conference ruling, to segregate those portions of the contracts relating on the one hand to the transportation of material for the telegraph company and on the other hand to the transmission of messages for the railroad companies, from all other operations under the contracts and all other considerations rendered by the parties in the way of services from each to the other?

I regret very much to have to trouble you with these matters, but as a very large part of the commercial operations of the telegraph company depends upon its connections with the various railroad companies which are covered by contract of this character, you will understand that it is very important that the company have before it an expression of your views with respect to how far it is intended this ruling is to be applied.

As cases are constantly arising both with respect to existing contracts and the renewal of old ones

as well as the negotiation of new ones involving these matters, I should be very glad to have your expression as to the various situations above outlined as early as convenient.

Very truly yours,

RUSH TAGGART,
General Counsel.

Exhibit H.

INTERSTATE COMMERCE COMMISSION.

Memorandum of The Western Union Telegraph Company respecting the application and effect of Conference Ruling of the Interstate Commerce Commission, dated July 15, 1914.

This ruling reads as follows:

> "Upon inquiry as to whether or not under the provision in Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation, under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of

> service, such service must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used alone the line of said railroad and in the construction, improvement or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

It is the understanding of the telegraph company that the foregoing ruling, in some way, grew out of the submission to the Commission of a question between the telegraph company and the Central Vermont Railroad Company as to whether the contract between the telegraph company and that railroad company could lawfully be carried out.

The question concerned the transportation by the railroad company of materials of the telegraph company for use on telegraph lines located beyond or off, but connected with the telegraph lines situated on the railroad company's railroad. A copy of the correspondence relating to the question is contained in a brief heretofore filed with the Commission, and also attached hereto and asked to be treated as a part of this memorandum.

Following the ruling the Western Union Telegraph Company, through its general counsel, called attention to some features of the ruling and their application to existing contracts between

the telegraph company and various railroad companies, and in response thereto, under date of January 5, 1915, the telegraph company was advised by Mr. Chairman Harlan that the Commission would be glad to receive and consider briefs on the question if filed on or before February 1, 1915.

In obedience to that suggestion, the telegraph company therefore begs leave to file this brief, together with the memorandum submitted with respect to the question between the telegraph company and the Central Vermont Railroad Company, and also to call attention to the provisions of the contract with that railroad company, reproduced as an appendix to this brief.

The contract of September 8th, 1885, between the Western Union Telegraph Company and the Central Vermont Railroad is fairly typical of a great number of contracts between the telegraph company and the various railroads throughout the United States, there being about three hundred contracts between the telegraph company and railroad companies operating throughout the country, many of such contracts covering a large number of railroads united in a so-called railroad system, so that in fact the contracts cover many more railroads than the number of contracts would seem to indicate.

While these contracts differ in certain features all have common points of resemblance, particularly with respect to the question now under consideration.

An examination of this particular contract shows a reference to earlier contracts between the same parties or their successors, running back to 1873; many of the railroad contracts run back to the year 1850 or 1860, this contract relation having existed between the railroad companies and the

telegraph companies from the time of the introduction of the telegraph service for public use.

It will be observed that the first part of this contract is taken up with the recital of the ownership by the railroad company of the railroads on the one part and by the telegraph company of telegraph lines on the other, and then proceeds by stating that the purpose of the contract for the exchange of services is to provide adequate telegraph facilities for the railroad company and for the purpose of maintaining all the telegraph lines referred to and the additions thereto with the greatest efficiency and economy in the interests of both parties.

This may be said to be a very adequate expression of the general purposes underlying the making and carrying out of all the contracts in existence from the time of the introduction of telegraphy down to the present time.

The second article of this contract provides that the telegraph company shall provide all poles, wire, insulators and other necessary material for the construction of a line of poles and one wire or more as it may elect, along future branches and extensions of the railroads and along railroads, thereafter constructed, owned, leased or controlled by the railroad company on which there may be no telegraph line, and in territory where the telegraph company is permitted to construct lines; and also to furnish poles, wires, insulators and other necessary material for the maintenance, operation, repair and reconstruction or renewal of its existing lines along the railroad company's railroads, branches and extension and to furnish instruments and local batteries, blank forms, stationery for commercial or public telegraph business, for the establishment, maintenance and operation of offices

along said railroads, and the use of its main batteries for the operation of the wires therein provided for.

In the third article there is a provision defining what the railroad company contributes to the construction of new lines and the reconstruction, repair and maintenance of existing lines. The railroad contributes the labor of its section men or unskilled labor, the telegraph company furnishing the skilled labor for the stringing and maintenance of wires, and also furnishing a skilled foreman.

In the fourth article provision is made for the extent of use which the railroad company shall have for its railroad business over the wires thus provided for, maintained and operated, with a provision for additional wires under certain conditions therein named. In case there is one wire it shall be used jointly so long as it is sufficient for the joint use of both parties, but in case it can no longer accommodate the business of both parties, there is a provision for an additional wire or wires and their division between the parties to the contract.

By the 6th article the railroad is secured in the right to use any patents, discoveries or inventions of the telegraph company, and the right to use telephone patents if available.

In the 7th article, provision is made (first) for the transmission of all messages relating to its railroad business between points on the line of said railroads; and (second) for the issuing of franks authorizing what is termed the "free" transmission of messages on the telegraph company's lines beyond or off the telegraph lines along the railroad company's railroads, to an amount not exceeding $15,000.00 per annum for the first 500 miles of railroad operated by the railroad company, and $6.00 per annum for each additional mile of railroad, the tolls on all such messages from points

beyond or off the lines of said railroads to be calculated at the regular commercial day rates fixed by the telegraph company between the points at which such messages originate and the points to which they are destined, and for any excess over the said $15,000 the railroad company is to pay the telegraph company one-half the aforesaid rates for such messages, settlement to be made yearly.

It is to be noted thta this "transmission of messages" is in no sense free if by that term is meant that the railroad company pays nothing for it. It is true in the limited sense that the holder of the frank pays no money for the message when filed with the telegraph company. The considerations furnished by the railroad company are the payment for these messages.

By the 8th article either party may establish telegraph stations at any point on the railroad it may deem necessary, and at all such stations as the railroad company may establish, the telegraph company agrees to supply instruments and local batteries and blank forms and stationery for commercial use. The railroad operators at such railroad telegraph stations are to receive, transmit and deliver for the telegraph company such commercial or public messages as may be offered and charge the tariff rates of the telegraph company thereon and render monthly statements and pay all such receipts to the telegraph company in such manner and at such times as it may direct, said operators to conform to all rules and regulations of the telegraph company.

By the 9th article the railroad company agrees to transport free of charge over its railroads all persons in the employ of the telegraph company when traveling on the business of paid company; and also to transport and distribute free of charge

along the line of its railroads all poles and other material for the construction, maintenance, operation, repair and reconstruction of the lines and wires covered by the agreement, and of such additional wires or lines of poles and wires as may be erected under its provisions. And the railroad company further agrees to transport without charge the poles and other material of the telegraph company to be used on its lines beyond or off the line of said railroads, to an amount computed at the regular current transportation rates of said railroad company, not exceeding one-third of the amount of free telegraphic service which the telegraph company agrees to perform for the railroad company beyond the line of its railroads, and the telegraph company is to pay the railroad company one-half its regular rates on all such transportation of poles and other material in excess of said amount, settlement to be made yearly. This transportation is "free" only in the sense that no payment is made in money for it. The considerations furnished by the telegraph company in the contract are the payment for it.

By the 10th article the railroad company agrees to furnish office room, light and fuel free of charge in case the telegraph company elects to establish an office at a railroad station, the telegraph company's operator at such office to do the railroad company's telegraph business if one person can attend to the business of both parties. If not, the railroad company is to furnish its own operator.

By the 11th article, in order to secure a permanent and efficient telegraph service, a right of way is granted to the telegraph company along all the lines of railroad and its branches and extensions covered by the agreement.

By the 12th article mutual indemnity is provided with respect to the operation of the lines.

By the 13th article, provision is made for the appointment of a joint superintendent, half of whose salary is to be paid by each of the parties, and who is to have charge of the operation of the telegraph lines.

By the 14th article it is agreed that the lines shall form a part of the general system of telegraph of the telegraph company, subject to its regulations and orders.

These are the essential features of the contract in question, and may be said to be fairly representative of the contracts existing between the telegraph company and practically all of the railroad companies in the country.

The relation existing, created between the two companies, is thus described by Mr. Justice McKenna, of the Supreme Court of the United States, in an opinion, rendered January 5, 1915, in the case of United States against the Erie Railroad Company, involving an indictment against the railroad company for carrying in the railway mail letters addressed to a railroad operator at a station on the railroad under a contract in its essential features similar to the one we have analyzed:

> "It will be observed that while the companies in many respects are independent, they are also in some respects at least, dependent. The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company would have to do. The railroad company has an interest in the receipts of the other company and is concerned in their amount and the maintenance and increase of the telegraph busi-

> ness. The control of the telegraph company's instrumentalities and its offices and operators is in a 'competent joint superintendent of telegraph,' in whose appointment the railroad company has a voice and whom it also may discharge. It is, however, not possible, and keep this opinion within a reaonable length, to detail the many ways in which the two companies are related, and while it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpurpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is 'current.' "

In the memorandum heretofore filed in this matter, attention has been called to several additional contracts, and attention was also called to the fact that copies of contracts between the telegraph company and the railroad companies throughout the country are on file with the Commission, thus enabling the Commission, if it desires, to confirm the statement that in their general features, they fall within the description of Mr. Justice McKenna above quoted. There is, without doubt, the interrelated dependency between the telegraph and the railroad companies in the operation of telegraph lines, as pointed out by him, which inter-relation has for many years been expressed in contracts controlling the furnishing and operation of the telegraph instrumentalities made available to the public by reason of this relation.

We wish, especially, to emphasize the fact that

such inter-relations have existed from the beginning of the telegraph, and that the two facilities, the railroad on the one hand and the telegraph on the other, have grown together and thus interdependent largely as a matter of necessity in order to extend the telegraph facilities to the public, and that without these inter-dependent relations, as expressed in the contract, the creation of such facilities to the public would have been much retarded if not altogether rendered impossible.

These facts, we respectfully submit, must be borne in mind in considering the intent of Congress expressed in the provisions of the first section of the Act to Regulate Commerce as amended June 18, 1910.

In amending the Act, which not only brought telegraph, telephone and cable companies under its provisions, but also enlarged the Act with reference to the railroad companies in some particulars, in the very first section of the Act after the amendment defining telegraph, telephone and cable companies as carriers subject to the Act and to be brought within its terms, and that all charges for the transmission of messages by telegraph, telephone and cable should be just and reasonable and every unjust and unreasonable charge for such service or any part thereof prohibited and declared to be unlawful, we find two very explicit provisions.

The first is that messages by telegraph, telephone or cable, subject to the provisions of the Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates are allowed to be charged for the different classes of messages.

The second provision is that nothing in the Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts

with common carriers for the exchange of services.

With respect to the first provision, it is to be noted that Congress has taken what is equivalent to "judicial notice" of the practices of the telegraph company with respect to the different classes of messages which had been created and existed at the time of the amendment, and Congress explicitly recognized these practices both as to the classification and as to the different rates permitted to be charged therefor.

It is only a fair inference that, with respect to the second proviso, Congress took equal notice of the vast inter-relations existing between the telegraph company and the railroad companies as expressed and shown by the contracts with practically every railroad in the country, and by the language employed indicated that it did not intend to destroy these relations which were the result of long experience and which in fact were so largely the basis for the existing system of commercial telegraph facilities furnished the public. In this connection it should be understood how completely these contractual relations enable the public to obtain and enjoy a general telegraphic service. Of the 25,000 offices of the telegraph company, over 20,000, it is safe to say, could not be maintained as independent telegraph offices, and but for such contracts would not afford telegraph facilities to the public. Certainly they would not exist as part of a comprehensive system.

The ruling of July 15, 1914, concerning which discussion has been requested, seems to proceed upon the assumption that the "exchange of services" referred to in the Act is restricted to the transmission of messages on the one hand, and the transportation of property on the other, and that that is the only thing Congress had in mind.

But we respectfully submit that the fair con-

struction of the language used by Congress requires a careful consideration of the situation of affairs existing at the time the amendment was made, the character of the telegraph property in existence and the manner in which these properties were worked. The most casual consideration of these facts indicates that what Congress had in mind was not the mere exchange of messages on the one part for transportation on the other, but an "exchange of services" upon the basis presented by the contracts existing at the time and under which the properties themselves had been created and were being operated. Any other meaning attached to this expression "exchange of services" would imply that Congress intended ruthlessly to destroy all these contractual relations.

These contracts provide for a real "exchange of services" of many and diverse kinds, as compared with the offsetting of bills for messages against bills for transportation, as limited by the ruling under question.

Under the contracts a railroad company furnishes a right of way, it furnishes transportation, it furnishes labor in various ways, it furnishes space, light and heat in its railroad stations, storage facilities in its warehouses, docks and yards for material, it furnishes the distribution in connection with the transportation of material along its roads. These are some of the contributions of a railroad company in the way of services, and constitute some of the considerations under which telegraph lines have been created and are being operated, maintained, and reconstructed as needed.

The telegraph company on its part furnishes material, poles, wires, cross arms, insulators, skilled labor in a greater or lesser degree, according to the particular contract, patent rights, instruments and other equipment, and in addition

thereto the transmission of messages in large amounts each year.

In the making of these contracts necessarily all the considerations on one side are estimated, and compared with all the considerations on the other, and these considerations are, as a whole, considered by the parties to the contract being as respectively fair equivalents, each for the other. It is therefore obviously impossible to separate the mere transmission of messages by the telegraph company on the one hand, or the transportation of telegraph material, either for use on the line of the railroad, or for use off the line of the railroad by the railroad company on the other, and to hold that Congress intended that there might be an offsetting of bills at the usual or current rates, and the exchange of checks or the payment of money for the difference, thus ignoring all other provisions of the contract under which various considerations are provided for the services performed by each for the other. If this were all that this language was meant to cover, it would seem scarcely worth the whole for Congress to insert the language in the Act. The right of way supplied by the railroad company might very well constitute if so agreed by the parties a proper consideration for the transmission of some of these various messages by the telegraph company for the railroad company; the furnishing of office space in the railroad stations might likewise be and is a large consideration for the transmission of many of the messages. On the other hand, the furnishing of poles and wires, batteries and materials to enable the railroad company to dispatch and regulate the running of its trains might also, if so stipulated by the parties, quite properly be the consideration for the transportation of much of the freight for the telegraph company by the railroad company, but

the important fact to note is that the parties have not so split up the considerations in the agreements, but all on one side, are made the equivalent of all on the other side. No separation is possible now. All stand or fall together. It is, we respectfully submit, not necessary, to detail the various services performed by one which might quite legally and properly constitute the consideration for the exchange of services as it existed under the contracts in existence at the time the amendment was passed, and it is, we think, quite clear that the limiting of this exchange of services to an offsetting of bills for transmission of messages and transportation of freight at the regular tariff or current rates, is not such an "exchange of services" as was contemplated by Congress.

If the ruling of July 15, 1914, is adhered to and applied to the Central Vermont Railroad contract, some of the material provisions of the contract are illegal. At least the ruling would require the railroad company to ignore some of the material provisions of the contract respecting the transportation of material, and therefore permit the telegraph company to take the position that in view of the failure of the railroad company to transport as provided in the contract, the telegraph company is free to treat the action of the railroad company as a repudiation of a material stipulation of the contract, and to terminate it. The same would likewise be true with respect to the services agreed to be rendered by the telegraph company. It would be compelled to charge the railroad company full rates for all excess messages instead of half rates as provided in the contract. This means that either the telegraph company and the railroad company must sit down and make up a supplemental contract or a new contract which will, in effect, meet the requirements of this ruling, or that the busi-

ness which has been created and maintained under the contract be terminated in large part. The situation thus created with respect to this contract will likewise result under the contracts with the other railroad companies, and chaos result with respect to the telegraph facilities throughout the country unless or until new arrangements can be made.

THE WESTERN UNION TELEGRAPH COMPANY,

By RUSH TAGGART,

Attorney.